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No. 84-1485 (13)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

WILLIAM F. REILLY
Public Defender of the
State of Rhode Island

PAULA ROSIN
Assistant Public Defender

Office of the Public Defender
250 Benefit Street
Providence, Rhode Island 02903
(401) 277-3492

Attorneys for Respondent

QUESTION PRESENTED

Whether the First Circuit Court of Appeals was correct in concluding that the Fifth Amendment rights of the respondent, a homicide suspect, were violated when the police secured three confessions from him -- a twenty-one year old male with a fifth grade education, who had been held incommunicado in the police station for six hours and had twice invoked his right to remain silent -- after his attorney called the police station five hours after the respondent's arrest, specifically asked the police if they intended to interrogate her client, and was told that there would be no interrogation, and the police thereafter failed to inform the respondent of his attorney's availabil[illegible] terrogated him?

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The opinion of the United States Court of Appeals For The First Circuit which granted the Respondent's petition for a writ of habeas corpus is reproduced in Appendix A. The case has been reported sub nom. Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985). The opinion of the United States District Court for the District of Rhode Island which denied Respondent's petition for a writ of habeas corpus is reproduced in Appendix B. That opinion has been reported sub nom. Burbine v. Moran, 589 F.Supp. 1245 (D.R.I. 1984). The opinion of the Rhode Island Supreme Court initially denying Respondent's direct appeal of his conviction in state court is reproduced in Appendix C. That opinion has been reported sub nom. State v. Burbine, 430 A.2d 438 (R.I. 1981). The opinion of the Rhode Island Supreme Court's denial of Respondent's direct appeal after reargument is reproduced in Appendix D. That opinion has been published sub nom. State v. Burbine, 451 A.2d 22 (R.I. 1982).

STATEMENT OF JURISDICTION

The Respondent agrees with the statement of jurisdiction as it appears in the petition for certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent agrees with the denotation of constitutional provisions appearing in the petition for certiorari (the Fifth Amendment to the Constitution of the United States). Respondent notes, however, that a further constitutional provision is involved, namely, United States Constitution, Amendment XIV, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

> reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is the Fourteenth Amendment that makes the Fifth Amendment provisions applicable to the states.

SUMMARY OF THE CASE

When Brian Burbine gave his first confession to the police, he had been in police custody for six hours, with absolutely no contact with anyone other than police personnel. At the time, Brian Burbine was twenty-one years old, with only a fifth grade education. Despite several attempts by the Cranston police to question him about a homicide the police suspected him of committing in the city of Providence, Rhode Island, Brian Burbine initially refused to talk to the police about the crime. After Brian had been in custody for five hours, an attorney called the police station on his behalf. The attorney, Allegra Munson, was a member of the Public Defender's Office, and Brian was a current client of that office. Allegra Munson called the police, to inquire about Brian's status and whether the police intended to interrogate him or place him in a lineup. The person with whom she spoke, who answered the phone saying "detectives," told Attorney Munson that the police were not going to interrogate Brian Burbine. At the very moment the officer gave the attorney this false information, the Providence police, who had been in the Cranston detectives' division for well over an hour, and who were being aided by the Cranston police, had every intention of questioning Brian Burbine as a suspect in the Providence homicide. The police never told Brian Burbine of his attorney's call. Less than a hour after Attorney Munson terminated her phone call, the Providence and Cranston police attempted to interrogate Mr. Burbine, but he denied any involvement in the homicide and refused to talk. Some twenty minutes

later, Mr. Burbine purportedly had a "change of heart," and the police proceeded to interrogate him on three separate occasions, and secured confessions from him.

In determining that Brian Burbine's Fifth Amendment rights were violated, the First Circuit Court of Appeals examined the totality of circumstances, and concluded, based on the unique facts of the case, that the police acted deliberately or, at the least recklessly, in misinforming Mr. Burbine's attorney and held that their failure to inform Brian Burbine of his attorney's availability, prior to questioning, defeated any finding of a valid waiver of his Fifth Amendment rights. Compare, Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984).

In asking this Court to grant certiorari in this case, the petitioner quarrels not with the legal standard applied by the First Circuit - namely, the long-standing totality of circumstances test - but rather with its application to the facts of this case. The petitioner has been unable to find any case in support of its disagreement with the Circuit Court because all other courts which have dealt with similar fact patterns, have examined those facts in their totality, and concluded, like the First Circuit, that a Fifth Amendment violation has occurred.

Having found no actual precedent in support of its position, the petitioner has manufactured a conflict between the First Circuit in Burbine and the Eleventh Circuit in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). As demonstrated infra, at 13-14, Hance is completely inapposite to the factual situation raised in Burbine. Contrary to the petitioner's unfounded assertions, there is no conflict among the federal courts on this issue, nor among the state courts that have ever dealt with this question. The only conflict that exists is between the First Circuit's decision in Burbine and the decisions of the Rhode Island Supreme Court in the same case. State v. Burbine, 451 A.2d 22 (R.I. 1982). That conflict, however, is hardly grounds enough for this Court to grant certiorari in this case.

Furthermore, while this case raises an interesting issue, the factual situation behind the issue occurs so very infrequently in reality that it hardly merits this Court's attention. Respondent has researched cases nationwide dating from the time of this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), and has found only seven state courts, besides the Rhode Island Supreme Court, and only two federal district courts, that have ever dealt with the Fifth Amendment issue raised here in cases with factual situations similar to Mr. Burbine's. United States v. Miller, 432 F.Supp. 382 (E.D.N.Y. 1977), aff'd 573 F.2d 1297 (2d Cir. 1978); United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972); Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash.App. 1978); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jackson, 303 So.2d 734 (La. 1974); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969). The holdings of all these cases are in total agreement with the First Circuit.

Finally, the petitioner takes issue with the First Circuit's factual findings that either the police officer who falsely informed Attorney Munson acted deliberately, or, at the very least, acted recklessly in failing to find out exactly what Mr. Burbine's status was when the attorney called, inquiring about whether the police planned to question her client. The petitioner, however, has essentially conceded that the police acted deliberately. There is no dispute that when Attorney Munson called the police, she specifically asked if the police intended to question Brian Burbine, and there is no dispute that she was told the police were not going to question her client. There is no dispute that, at the time of Allegra Munson's call, the Providence police, with full knowledge of the Cranston police, were present in the Cranston station and had every intention

of interrogating Brian Burbine about a homicide. This Court need only read the petitioner's "Question Presented" to realize that, for purposes of its argument, the petitioner is assuming that Attorney Munson was given misleading information and that Mr. Burbine was not informed of his attorney's call. Despite his protestations to the contrary, the petitioner acknowledges the abundance of facts on the record that lead to no other conclusion but that the police acted deliberately or recklessly in this case.

The facts of this case are outrageous. Brian Burbine, by virtue of his young age and grossly inadequate educational background was hardly a match for the expertise of seasoned police detectives, yet on two occasions he attempted to withstand police pressure and refused to talk. The police succeeded in wearing Mr. Burbine down, however, by holding him incommunicado for six hours, by fending off Mr. Burbine's attorney by deliberately lying to her, and then by failing to inform Mr. Burbine that his attorney was ready, willing, and able to consult with him prior to interrogation. The First Circuit Court of Appeals was shocked by what happened in this case, and found, on the basis of these peculiar facts, that the police had violated Brian Burbine's Fifth Amendment rights. The respondent submits that that ruling is unassailable, and the petitioner has set forth no meritorious reasons why this Court should expend its valuable time and energy to review the First Circuit's decision.

STATEMENT OF THE FACTS

On March 3, 1977, Jeremiah Medeiros, an employee of the Furnace and Duct Supply Company on Elmwood Avenue in Providence, went out to the business' parking lot to get cigarettes. There he discovered a woman lying unconscious next to a truck. Mr. Medeiros informed a co-worker who contacted the police. The woman was taken to St. Joseph's Hospital, where she was later identified as Mary Jo Hickey. Ms. Hickey remained in the hospital until March 25, 1977, when she

died. The medical examiner determined that the manner of death was homicidal, death resulting from cranial cerebral trauma.

On June 29, 1977, sometime between 3:00 and 4:00 p.m., the Cranston police arrested three men in connection with an alleged breaking and entering. One of these men was Brian Burbine; the other two were Donald Sparks and a man named DiOrio. All three suspects were transported to the Cranston police station where they were processed. At the time that Mr. Burbine and his two companions were booked, Nicholas Ferranti, Jr., a Cranston police detective, was on duty and present in the Cranston station. Det. Ferranti testified that two days prior to Mr. Burbine's arrest, he had received information from a confidential informant that a man named Butch who lived at 306 New York Avenue in Providence was responsible for the killing of Mary Jo Hickey which had occurred in Providence in March of 1977. Det. Ferranti checked the information received on the three men and found that Brian Burbine and DiOrio had given 306 New York Avenue as their home address. Ferranti questioned DiOrio who stated that Brian Burbine was the only person living at that address who was called "Butch".

Armed with this information, Det. Ferranti confronted Mr. Burbine in the interrogation room where the petitioner had been placed following his booking on the breaking and entering charge. Ferranti claimed that he informed Mr. Burbine of his constitutional rights, but Mr. Burbine refused to sign the rights form or talk about the homicide. Ferranti asked Mr. Burbine if he knew anyone named Butch who lived on New York Avenue. Mr. Burbine responded that he was the only person called "Butch" who lived there.

Det. Ferranti then left Mr. Burbine in the interrogation room, and spoke with DiOrio and Sparks. Both men made statements implicating Brian Burbine in the Providence homicide. Ferranti proceeded to contact Captain Richard Wilson of the Providence police department - the time was approximately 6:00 p.m.. Captain Wilson, along with Lt. Bernard Gannon and Detective Edward Trafford, responded to the Cran-

ston police station with the express purpose of questioning Brian Burbine regarding the homicide investigation. They arrived at approximately 7:00 p.m., went to the detectives' division, spoke with Det. Ferranti, and then questioned Sparks and DiOrio.

While these events were unfolding in Cranston, Sheila Ray, Brian Burbine's sister, called the Public Defender's Office to seek assistance for her brother. Barbara Hurst, an appellate attorney, took the call at approximately 7:45 p.m.. Ms. Ray informed Ms. Hurst that her brother had been arrested for breaking and entering and was being held in the Cranston police station. Ms. Ray further stated that her brother was then being represented by the Public Defender's Office - specifically by Richard Casparian, Deputy Public Defender - in another matter, and in fact, Mr. Burbine had had an appointment with Mr. Casparian that very afternoon which he had missed due to his arrest. Barbara Hurst attempted to contact Richard Casparian but could not reach him. She then called Allegra Munson, an assistant Public Defender, and informed Ms. Munson of her telephone conversation with Sheila Ray.

Allegra Munson called the Cranston police station at approximately 8:15 - 8:20 p.m. She asked that her call be transferred to the detectives' division; eventually a man answered the phone and said "detectives". Ms. Munson told the officer on the phone her name, and that she was an attorney in the Public Defender's Office. Ms. Munson then asked if Brian Burbine was being held and the officer responded affirmatively.[1] Ms. Munson explained to the officer that Brian Burbine was represented by Richard Casparian who was not available, and that if the police intended to put Mr. Burbine in a lineup or

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1. Barbara Hurst testified that she was told by Sheila Ray (respondent's sister) that her brother had been arrested along with a "co-defendant" who might have been a client of the Public Defender as well. Allegra Munson testified that when she called the Cranston police station, she inquired about the status of Brian Burbine and a man named Sparks. Ms. Munson stated that she knew Brian Burbine was represented by the Public Defender's Officer, but she did not know whether Sparks was also a client.

question him, Ms. Munson would act as his legal counsel. The officer on the phone told Ms. Munson that the police would not be questioning Brian Burbine or putting him in a lineup and that they were through with Mr. Burbine for the night. Believing that the police were not going to interrogate Mr. Burbine, Ms. Munson terminated the call.

Cranston police officers Ferranti, Detective Raymond Ricard, and Captain Ernest Delmonico, along with all the Providence police who were present in the Cranston station, denied any knowledge of Ms. Munson's phone call. At the time that Ms. Munson's telephone conversation took place, all three of the Cranston officers knew that the Providence police were present in the Cranston station, and knew that the Providence police intended to interrogate Brian Burbine regarding the homicide investigation. Lt. Ricard testified that he and Ferranti were the only detectives working in the station on the night of June 29th. He further stated that when a telephone call comes into the station, the switchboard operator's normal practice is to relay messages to the appropriate department, or to connect the call to the officer in charge of the station. Captain Delmonico, the officer in charge of the station on the night of June 29th, testified that if he had received Ms. Munson's call, his usual procedure would have been to check with the detectives division.

Following Attorney Munson's call, Brian Burbine was brought into the main room in the detective division, surrounded by both the Cranston and Providence police. The police testified that they advised Mr. Burbine of his rights, and Brian denied any involvement and refused to speak further. Twenty minutes later, according to the police, Mr. Burbine banged on the door of his interrogation room, and said that he wanted to talk.

At approximately 9:20 p.m., Providence detectives Gannon and Trafford, with Cranston detective Ferranti in attendance, proceeded to interrogate Brian Burbine about the killing of Mary Jo Hickey. Det. Gannon testified that he notified Mr. Burbine of his constitutional

rights, and that Mr. Burbine agreed to talk. The police did not inform Mr. Burbine of Ms. Munson's phone call. The interrogation concluded at 10:20 p.m., resulting in a signed confession. At approximately 11:20 p.m., the Providence police took a second incriminating statement from Mr. Burbine, allegedly at his instigation. The Providence police finally left the Cranston station at midnight (leaving Mr. Burbine with the Cranston police).

The next morning, June 30, 1977, the police succeeded in making another "end run" around Mr. Burbine's attorney. Brian Burbine was taken to the Eighth Division District Court by the Cranston police, to be arraigned on a misdemeanor charge of malicious damage to property (reduced from the original felony charge of breaking and entering). Members of the Providence police department were present in the courtroom, armed with an arrest warrant for Mr. Burbine. Although Mr. Burbine was not represented by legal counsel, the district court judge accepted his plea of guilt to the charge and sentenced Mr. Burbine to six months at the Adult Correctional Institutions.[2] The judge then ordered that the sentence was to commence upon Mr. Burbine's release from the custody of the Providence police. Mr. Burbine was then transported to Providence police headquarters and placed in an interrogation room in the detective division. Det. Trafford proceeded to interrogate Mr. Burbine and took a third inculpatory statement from him.

After successfully obtaining this third statement from an uncounseled Brian Burbine, Det. Trafford then informed petitioner that he would be placed in a lineup and that he should have an attorney present. Trafford testified that Mr. Burbine said that he did not

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2. Mr. Burbine testified at the suppression hearing that when the judge accepted his uncounseled guilty plea, the judge only inquired as to whether Brian understood why he was pleading guilty and other words to that effect. Mr. Burbine stated that the judge did not advise him that he had the right to the presence of an attorney prior to any questioning, or advise him of any of his pre-interrogation rights. This testimony was not refuted by the state.

want an attorney, but Trafford insisted that Mr. Burbine would have to have one present at the lineup. According to Trafford, he asked if Brian wished to call the Public Defender's Office or a private attorney, and Brian mentioned Richard Casparian. Trafford informed his superiors, and Major Leyden called the Public Defender's Office.[3] Thomas Luongo, Jr. took the call, and informed Major Leyden that Brian Burbine in fact was represented by the Public Defender's Office. Upon receiving notification of Mr. Burbine's situation, Richard Casparian immediately went down to the Providence police station and consulted with Brian Burbine.

The facts as set forth above were testified to at the hearing on Mr. Burbine's motion to supress the three incriminatory statements, and the tangible evidence seized as a result. Mr. Burbine argued that the actions of the police in actively fending off Mr. Burbine's legal counsel, and the failure of the police to tell him of his attorney's availability, violated his privilege against self-incrimination and his right to counsel, and effectively deprived him of due process of law. Although the trial justice found that the telephone call testified to by Allegra Munson was in fact made, and carried out in the manner that she described, he declined to find that the police acted unlawfully.

At trial, in addition to presenting Mr. Burbine's three confessions, the state presented two witnesses - Nancy James and Donald Sparks - who testified to statements Mr. Burbine had made to them, incriminating himself in the killing of Mary Jo Hickey. The prosecution also presented tangible evidence and expert testimony establishing that Mary Jo Hickey died of head wounds resulting from a

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3. According to Trafford, he began taking the third statement at 12:05 p.m. and finished at about 12:30 p.m.. Trafford's testimony was not consistent with that of Major Leyden who stated that he called the Public Defender's Office at about noontime on June 30th for purposes of securing an attorney for the lineup. Major Leyden's testimony was corroborated by Thomas Luongo, Jr., who stated that he took Leyden's phone call at 12:05 p.m.

beating. Although Mr. Burbine did not testify at his trial, a defense of intoxication was presented to the jury through the police statements and through the testimony of Nancy James and Donald Sparks.

The case was submitted to the jury for deliberation on March 2, 1979. The jury found Brian Burbine guilty of first degree murder, and he was sentenced on March 20, 1979, to the mandatory term of life imprisonment.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

While the respondent agrees with the petitioner's statement as to how the federal question was raised and decided below, respondent must add the following. The respondent raised in the trial court three separate grounds for challenging the admissibility of his confessions - the Fifth Amendment, the Sixth Amendment, and the Fourteenth Amendment. The Rhode Island Supreme Court upheld Mr. Burbine's conviction and affirmed the trial justice's denial of his claim that these three constitutional provisions had been violated. State v. Burbine, 451 A.2d at 30-31. In denying Mr. Burbine's petition for writ of habeas corpus, the United States District Court for the District of Rhode Island rejected his claimed violations of his Fifth, Sixth, and Fourteenth Amendment rights. Burbine v. Moran, 589 F.Supp. at 1249, 1253-54. In its decision, reversing the district court and granting Mr. Burbine's petition, the First Circuit Court of Appeals addressed only the Fifth Amendment constitutional claim. Burbine v. Moran, 753 F.2d at 187, n.5.

1. The Decision of the First Circuit Court of Appeals is Not in Conflict With Any Other Federal or State Court That Has Addressed the Issue Raised Herein.

In pressing this Court to grant certiorari, the petitioner has manufactured the existence of a split of authority on the issue of whether a Fifth Amendment violation occurs when the police withhold

from the accused the knowledge that an attorney is available for consultation prior to interrogation. The petitioner claims that in Hance v. Zant 696 F.2d 940 (11th Cir. 1983), cert. den. 103 S.Ct. 3544 (1983), the Eleventh Circuit Court of Appeals took a position directly contrary to that taken by the First Circuit in Burbine. Nothing could be further from the truth. In fact, the Fifth Amendment issue as it is presented in this case never arose in Hance. In that case, an attorney who had represented the defendant previously, heard of Hance's arrest and gratuitously tried to locate him, to advise Hance of his rights. Hance was in the military, and was being held in military headquarters. The attorney called the county jail and the city police station first, and personnel there knew nothing about Hance's predicament. Apparently, by the time the attorney contacted military headquarters, Hance had confessed. Once the military authorities learned of the attorney, they immediately notified Hance, who refused to see the lawyer. Thus, as the Eleventh Circuit noted, the lawyer was never misinformed and refused access to the defendant, and the defendant was notified of the attorney's availability as soon as the military authorities became aware of the attorney's involvement by virtue of the lawyer's call to headquarters. Hance v. Zant, 696 F.2d at 947.

The petitioner concedes in his petition for writ of certiorari that the opinion in Hance does not reveal what information was provided the attorney by the police. It seems that there was no allegation that the attorney had been misinformed of Hance's whereabouts and situation, and, indeed, the Eleventh Circuit noted that the lawyer was not misinformed. In Burbine, the defendant's lawyer was grossly misled, when the police told her they did not intend to question her client at a time when that was absolutely their intention. Furthermore, in Hance, once the police learned of the attorney's involvement, they immediately notified the defendant. That notification never occurred in this case. Thus, there is nothing in the Hance case that

conflicts with the First Circuit's decision in Burbine, because the Eleventh Circuit was not dealing with the same factual situation. The Circuit Court in Hance applied the identical legal standard that the First Circuit applied in Burbine, but to an entirely different fact pattern.

The First Circuit's decision is directly in line with every other court that has ever addressed the Fifth Amendment issue raised in this factual context, other than the Rhode Island Supreme Court and the district court. The respondent knows of only two other federal decisions that have dealt with this issue. In United States v. Miller, 432 F.Supp. 382 (E.D. N.Y. 1977), aff'd 573 F.2d 1297 (2d Cir. 1978), following the defendant's arrest on a federal charge, his wife contacted an attorney who had represented the defendant in an unrelated state court matter. The attorney contacted one of the arresting agents, and instructed him not to question the defendant. The attorney also contacted an agent at F.B.I. headquarters in Manhattan, advised the agent that he was Miller's attorney, and requested that Miller not be questioned. The agent replied that if Miller wanted to talk, he would listen. While Miller was being transported by the arresting officers to headquarters, he stated that he did not want to talk until he spoke with his attorney. At headquarters, Miller was questioned, and despite inquiries concerning his attorney, and at least one refusal to sign a waiver of rights form, Miller eventually confessed. The District Court held, in part, that the failure of the F.B.I. to heed the attorney's instructions violated Miller's Fifth Amendment rights.

In United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972), federal narcotics agents had an arrest warrant for the defendant, on federal drug charges. Wedra's attorney contacted the authorities, and informed them that the defendant wanted to surrender, which he did. The attorney informed the arresting agents a letter that he did not want his client questioned in any manner outside of his presence. The

defendant was taken to a federal office, and his lawyer followed. The lawyer was told by an agent named Lepore that Wedra was being processed, and that he had no intention of questioning Wedra. The attorney returned to his office, but before doing so he informed Lepore that he did not want Wedra questioned, and also advised Wedra not to answer questions. Ten minutes later, other agents arrived, and proceeded to interrogate Wedra. Lepore did not tell the interrogating agents of the attorney's admonishment not to question his client outside of his presence. The district court held that the defendant's Fifth and Sixth Amendment rights had been violated.

Finally, the First Circuit's decision in Burbine is in complete agreement with every state court that has ever dealt with the Fifth Amendment issue raised herein, save for the Rhode Island Supreme Court in State v. Burbine, 451 A.2d 22 (R.I. 1982). See, Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash.App. 1978); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jackson, 303 So.2d 734 (La. 1974); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969). These courts have all held that when an attorney contacts the police on behalf of a individual who has been arrested and is targeted for interrogation, and the police fail to inform the accused of the attorney's availability, any "waiver" obtained is invalid.

2. The First Circuit's Decision Merely Brings Rhode Island Law Into Line With Every Other Court That Has Ever Addressed the Fifth Amendment Issue Raised in This Case.

The respondent agrees with the petitioner's assertion that the Court of Appeals for the First Circuit has decided a federal question in a way that directly conflicts with the Rhode Island Supreme Court. While arguably a ground for certiorari, it hardly seems a compelling

one. Indeed, if this ground was sufficient for review by this Court, according to the petitioner, this Court would be required to grant review in every case in which a petition for habeas corpus had been granted.

Furthermore, and once again, it is the Rhode Island Supreme Court's decision in State v. Burbine, supra, that conflicts with every other court that has ever decided this precise issue. In State v. Burbine, supra, a bare majority of the Rhode Island Supreme Court ignored the approach taken in the prior cases, and held that the existence of an attorney/client relationship was insignificant, that only the defendant could invoke the constitutional protections guaranteed by the Fifth, Sixth, and Fourteenth Amendments, and that the police had no obligation to inform the defendant of the attorney's availability. All the other jurisdictions that have considered the issue raised here have found in favor of the accused. These courts have analyzed the issue from the perspective of waiver, and have determined that, if an attorney is available, and makes that availability known to the police, the police have an affirmative duty to inform the defendant of the attorney's availability. If the police fail to do so, any "waiver" that is obtained is invalid. Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash.App. 1978); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jackson, 303 So.2d 734 (La. 1974); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969).

The Rhode Island Supreme Court court incorrectly equated the impermissible exercise of the rights of another with efforts to provide legal assistance to a suspect in custody. The state court emphasized the third party retention of counsel and the lack of an attorney-client relationship, and did not focus on the issue of waiver. Al-

though the court made a cursory examination of the totality of the circumstances surrounding the waiver, the thrust of the decision was directed toward the attorney's purported assertion of Mr. Burbine's fifth amendment rights. The Rhode Island Supreme Court effectively held that the lawyer's involvement and the failure of the police to inform Mr. Burbine of his attorney's availability were legally irrelevant, because the fact of the attorney's availability would never have any bearing on the defendant's decision whether to waive or exercise his constitutional rights.

In so holding, the Rhode Island Supreme Court adopted a position that was directly contrary to the rulings of every other court, and applied a different standard. The First Circuit, and the other courts cited above, looked at the question from the perspective of whether there had been a valid waiver, and applied the traditional totality of circumstances test. The Rhode Island Supreme Court's decision is a legal aberration, holding as it did that the circumstances involving the attorney, and the failure of the police to inform the defendant of the attorney's availability, had no bearing on the determination of whether Mr. Burbine had validly waived his rights.

3. The Fifth Amendment Issue Raised Herein, While Interesting, Arises Infrequently.

The respondent has already noted above that there are only two other federal cases that have dealt with the Fifth Amendment question raised herein, and even those cases involved other issues. United States v. Miller, 432 F.Supp. 382 (E.D.N.Y. 1977), aff'd 573 F.2d 1297 (2d Cir. 1978); United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972). Furthermore, only eight state courts have considered this question, including the Rhode Island Supreme Court in State v. Burbine, supra.

In reaching the decision it did, the First Circuit did not go against the tide of prior authority, nor this Court's own rulings. As

noted supra, at 4, the First Circuit analyzed this case from the standpoint of waiver, applying the long-established "totality of circumstances" test, and stated that

> [i]n determining whether [the defendant's] waiver was valid, we are to assess "'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'" North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 1757-58, 60 L.Ed.2d 286 (1979) — quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Burbine v. Moran, 753 F.2d at 183. All this case involves is a fact-sensitive application of the totality of circumstances standard. The First Circuit considered the trial judge's factual findings that Brian Burbine was advised of his constitutional rights prior to the three critical interrogations, and that Mr. Burbine, both verbally and once in writing, executed a "waiver" of those rights. The Circuit Court also noted that at the time of his arrest and interrogation, Brian Burbine was 21 years old, with only a fifth grade education. Although Mr. Burbine was at the time represented on a pending criminal matter by the Public Defender's Office he had not yet consulted with his attorney on that matter. Mr. Burbine also demonstrated nervousness and refused two times to submit to interrogation. The First Circuit then added to these circumstances, the following facts: (1)that an attorney from the Public Defender's Office had called the police; (2)that at the time of her call, Mr. Burbine was a current client of the Public Defender's Office; (3) that the attorney clearly informed the police of her professional position and involvement with the defendant; (4) that the attorney specifically asked whether the police were going to interrogate her client because, if they were, she would make herself available; (5)that the police specifically told the attorney that the police were not going to question Mr. Burbine and were through with him for the night; and (6)that the police failed to inform the defendant of his attorney's call and availability prior to interrogation. The First Circuit concluded that, had Mr. Burbine been

fully informed of his attorney's availability, his decision to waive his rights might very well have been different.

Prior to the Burbine case, the First Circuit had applied the same totality of circumstances test to a case with a somewhat similar factual pattern, and came to a different conclusion. In Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984), the defendant had been arrested as a suspect in a double homicide, and the police intended to interrogate him. Prior to the arrest, a police officer called the defendant's attorney, trying to locate the defendant. Fuentes had a long-standing relationship with the attorney and had had several prior contacts with the criminal justice system, some for very serious felonies. Fuentes also had attended junior college. When the attorney found out about the defendant's arrest, he called the police station, and was told that his client was being held only on a warrant issued in a misdemeanor case. The attorney never asked if the defendant was going to be subjected to interrogation on the murder, although he knew the police wanted to question Fuentes about that crime. Instead, he went out for several hours, during which time Fuentes was questioned and confessed to the homicides. The First Circuit examined all the circumstances surrounding that confession, and determined that this was not a case in which an attorney affirmatively informed the police of his availability, and, consequently, it would have been of no use to tell the defendant of his attorney's "half-hearted" efforts to determine his status. Id. at 181. The Circuit Court determined in Fuentes that, given the defendant's educational background, and his extensive prior criminal record, his decision whether or not to waive his rights would not have been influenced by knowledge that his attorney had contacted the police but apparently was not actually available for consultation. Thus, Fuentes demonstrates that the First Circuit has taken a very moderate position, and also indicates quite clearly once again that the Burbine decision is limited to its own unique facts.

The petitioner argues that the First Circuit's decision goes against this Court's holdings in United States v. Nobles, 422 U.S. 225 (1975) and Couch v. United States, 409 U.S. 322 (1973). These cases, however, do not share the setting of custodial interrogation present in Burbine, but merely deal with agents' compelled production of papers containing information which incriminates another.

The First Circuit did not hold that the attorney in this case invoked Mr. Burbine's constitutional rights. The court analyzed the case solely from the perspective of whether there had been a knowing waiver. In the First Circuit's view, the attempted representation by the attorney was not an assertion of the rights of the accused by a third person, but merely information which would have insured that Brian Burbine's decision to waive or exercise his fifth amendment rights was truly knowing and intelligent.

The district court below, although claiming that knowledge of the attorney's involvement was not irrelevant, ultimately decided that such information was useless. The district court purported to apply a totality of circumstances test, but, in the end, like the Rhode Island Supreme Court, determined that knowledge of his attorney's actual availability would have made no difference to Brian Burbine when he was making the critical decision whether or not to waive his rights. The district court reached that conclusion by noting that Mr. Burbine had some prior contacts with the criminal justice system and the defendant was not illiterate. Of course, the record demonstrated only that Mr. Burbine had a pending criminal charge, on which he was being represented by the Public Defender's Office, and from this single fact, the district court presumed that Mr. Burbine was intimately and fully acquainted with the criminal process.[4]

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4. In fact, Brian Burbine had never been subjected to interrogation before, and had never actually met Richard Casparian, the attorney assigned to represent him on that pending charge. Mr. Burbine's appointment that he missed due to his arrest was to have been the first time he met his attorney in person. Prior to that time, he only had spoken with Mr. Casparian on the telephone.

To the contrary, the First Circuit held that knowledge of his attorney's availability was critical to Brian Burbine's decision whether or not to waive his rights, and that holding squares with the holdings of the other courts that have dealt with this question. See, e.g., People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107; State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jackson, 303 So.2d 734 (La. 1974). The petitioner is not quarreling with the standard used by the First Circuit, but complains about the First Circuit's application of the standard to the facts of this case. Respondent submits that this Court should not take a case in which all the petitioner is really asking this Court to do is to reapply a legal standard. The type of fact situation presented in this case occurs most infrequently, and when it does, courts uniformly hold that no valid Fifth Amendment waiver has occurred. The First Circuit thus merely applied the right legal standard to some very unusual, not oft-repeated facts, and came to the same conclusion as every other court.

4. The First Circuit Court of Appeals Complied Fully With This Court's Holding in Sumner v. Mata, 455 U.S. 591 (1982), And Merely Made Additional, Amply Supported Factual Findings That Had Not Been Made By The State Courts And That Have Been Conceded by the Petitioner.

In habeas corpus proceedings, generally, state court findings of fact are entitled to a presumption of correctness by the federal courts. Sumner v. Mata, 455 U.S. 591, 597 (1982). In this case, the trial judge made only two factual findings relevant to the issue at bar. The judge made the critical factual finding that Attorney Munson's telephone conversation took place as she had testified, and the First Circuit gave that factual finding a presumption of correctness, as it should have done. The only other pertinent finding the trial judge made was that there was no conspiracy or collusion on the part of the Cranston police to keep Mr. Burbine away from his attorney.

The First Circuit also gave full faith and credit to that finding. However, the First Circuit realized that the finding of no conspiracy in no way answered the plain and uncontested fact that Attorney Munson was given blatantly false information and that Mr. Burbine was never told of his attorney's availability. Neither the trial judge, the Rhode Island Supreme Court, or the federal district court made any findings with respect to whether one police officer, acting alone, deliberately deceived Attorney Munson and deliberately failed to inform Mr. Burbine of his attorney's availability, or whether the police acted recklessly. Those findings were made by the Circuit Court precisely because it was obligated to accept that Attorney Munson's phone call took place as she testified, and as the trial judge accepted.

In reaching its conclusion that either the person who spoke with Attorney Munson acted deliberately or, at the least, recklessly, the First Circuit simply came to the only conclusions it could on the basis of the record of this case. The First Circuit rejected the petitioner's convoluted effort to explain away the phone call, by claiming that whoever spoke with Attorney Munson made a good faith mistake. The First Circuit noted that the state's sole position at the suppression hearing was that Ms. Munson was lying about her conversation with the police, not that some unwitting police officer answered the phone and honestly was not aware of the intention to interrogate Brian Burbine:

> [T]he state's sole line of argument before the Superior Court was not that some person other than the officers known to have been involved with Burbine answered Munson's call, but that there was no such call.

Burbine v. Moran, 753 F.2d at 186.

Similarly, given its obligation to accept as given the fact of the phone call, the First Circuit had to reject the state's excuse, offered much too late, that some other police officer answered the phone. The First Circuit noted that there was no testimony whatsoever

on the record that such an event had occurred. This so-called other, innocent officer never testified at the suppression hearing and the Court also noted that, according to the record, the person with whom Attorney Munson spoke never hesitated once in his answers to her questions - he never left the phone to check with others to find out what Mr. Burbine's status was and whether anyone intended to question the respondent. In fact, by their own testimony at the suppression hearing, the police discredited this "other officer" theory, by adamantly claiming that they, and only they, would have spoken with the attorney if she had called.

It was on the basis of the factual findings made by the state court, coupled with the clear, uncontested facts on the record, that the First Circuit found that the officer who spoke with Attorney Munson acted deliberately, or, at the very least, was inexcusably reckless. Indeed, the petitioner concedes that Attorney Munson was grossly misinformed and that the police failed to advise Brian Burbine of his attorney's availability. As the petitioner must equally concede that there is no evidence whatsoever on the record to support his lame excuses for what happened, the First Circuit's findings cannot be faulted. The First Circuit made additional factual findings that were necessary to truly give full force and effect to those findings already made by the state courts. In this regard, the First Circuit was well within its authority. See, e.g., Brewer v. Williams, 430 U.S. 387 (1977)(Supreme Court upheld lower federal court's relevant findings of fact not made by the state courts when those factual findings were necessary to proper enforcement of federal rights); Whitus v. Georgia, 385 U.S. 545 (1967)(It is the province of the Supreme Court to analyze facts in order that appropriate enforcement of federal rights may be assured); Norris v. Alabama, 294 U.S. 587 (1935)(incumbent upon Court to analyze facts in order to assure proper enforcement of federal rights).

CONCLUSION

The First Circuit's decision granting Brian Burbine's petition for writ of habeas corpus is not in conflict with any other federal or state court that has ever dealt with a similar factual pattern. This case involves a factual pattern that arises most infrequently, and the First Circuit merely applied a long-standing legal mode of analysis to these very unique facts. The petitioner does not, and cannot, take issue with the standard employed by the First Circuit but only with its application of that standard. The decision in Burbine, however, is limited to its precise facts. The First Circuit made no sweeping rulings: it did nothing but hold that in this case, in which a young, poorly educated defendant, who had been held incommunicado for over six hours, who twice stood up to the police and refused to talk, but whose will was eventually overcome by the police when they lied to his attorney, and failed to tell him of his attorney's availability, thus prolonging the defendant's feelings of isolation, the waiver of Fifth Amendment rights secured by the police was legally invalid, under the totality of circumstances standard. Accordingly, respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

WILLIAM F. REILLY
Public Defender

PAULA ROSIN
Assistant Public Defender

Office of the Public Defender
250 Benefit Street
Providence, Rhode Island 02903
(401) 277-3492

Attorneys for Respondent